In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE PUBLIC CLEARING HOUSE, appellant,
v.
F. E. COYNE, AS POSTMASTER OF THE CITY of Chicago, in the State of Illinois, appellee.
No. 224.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This was a bill in equity filed in the circuit court of the United States for the northern district of Illinois to restrain F. E. Coyne, as postmaster of the city of Chicago, in the State of Illinois, from depriving the complainant of the use and privileges of the United States mails.

The bill charges in substance that the complainant is a corporation organized under the laws of the State of Illinois "to do a general brokerage and commission business, to collect and disburse

money, to conduct an exchange and information bureau for patrons, and to act as agent for patrons for the aforesaid objects and purposes;" that it was proceeding with its business and had been appointed the fiscal agent of a voluntary association called the League of Equity, and that the use and privileges of the United States mails, which it enjoyed until November 13, 1902, are indispensable to the success of the work it had undertaken; that on the 10th day of November, 1902, the Postmaster-General, acting "under and by virtue of sections 3929 and 4041 of the Revised Statutes of the United States, as amended," addressed to the defendant as postmaster at the city of Chicago, Ill., what is commonly known as a "fraud" order, in pursuance of which the said postmaster, on and since the 13th day of November, 1902, has stopped, prevented, and prohibited the delivery and distribution to the complainant of sealed letters, packages, packets, registered letters, and other matter addressed to it and received in the ordinary course of the mail at the United States post-office at Chicago, and has stopped, prevented, and prohibited the payment to the complainant of post-office money orders in its favor, all to its irreparable damage and injury. Then, after denying the facts upon which the order was based, that is, after denying that complainant is engaged in promoting any lottery or gift enterprise or any sort of fraudulent scheme, as charged by the Postmaster-

General, the bill alleges that the statutes under which the Postmaster-General issued the order in question "are in violation of the fourth, fifth, and fourteenth amendments of the Constitution of the United States and other provisions of the Constitution of the United States, in that the same undertakes to deprive persons of property and would deprive your orator, if enforced, of its property and property rights without due process of law; and in fact it attempts and if enforced will place in power of the postmasters of the United States and of the Post-Office Department of the United States the sole and exclusive right to pass upon the rights of your orator as between itself and other parties with whom it deals and transacts business through the mails without a hearing, and that said sections and provisions of the statute are void for the reason that they provide for no tribunal, court, or authority to hear and determine any violation of the statute, or claimed violation of the statute, but placed the same absolutely in the power and control of the postmasters and the Post-Office Department, and attempts to vest an arbitrary discretion in the postmasters and the Post-Office Department to determine for themselves, as they see fit, whether right or wrong, the question as to who shall and who shall not have and receive mail from the United States Post-Office Department, and who shall and who shall not use the United States mails, and vests in them

the power, if enforced, to interdict and absolutely prohibit the carrying on of all commercial and business transactions of the country done through the mailing system if they see fit to do so, and makes the postmasters and Post-Office Department the sole judges in their own case."

It was also alleged that sealed letters, *with the address of the senders thereon*, were sent to the Dead-Letter Office and opened. As might have been expected, this allegation was not established by evidence. So far from authorizing any such arbitrary proceeding, the statutes in express terms prohibit it, and the Postmaster-General's order directs that such letters be returned to the senders in accordance with the terms of the statutes.

The bill concludes with a prayer that the defendant be enjoined from depriving complainant of the use and privileges of the United States mails.

The defendant answered the bill and also demurred to it. The demurrer does not seem to have been pressed. The answer denies that the complainant has been or is doing the business for which it was organized, and then goes on to allege, among other things, that the complainant and the League of Equity referred to in the bill are successors to the League of Educators, against which the Postmaster-General, under date of October 22, 1902, issued a "fraud" order, which is still in force, having always been acquiesced in; that, with the intention of evading that order, the persons who had conducted the League of Educators caused

the complainant corporation to be organized for the purpose of continuing the enterprise of the said League of Educators; that the scheme operated by the complainant corporation is fraudulent in its design as well as a lottery, and was so found to be by the Postmaster-General, whose duty it is to determine those questions in the first instance. The answer then continues the recital of the facts which led the Postmaster-General to issue a "fraud" order against the League of Educators, and concludes:

> This defendant further says that the said plan of operation of the complainant and its employees, and those promoting it, is a violation of the Federal laws for the suppression of lotteries; that the amount of money that any of the patrons shall receive depends upon chance—that is, it is a matter of chance as to how many new members will join or whether any will join—that is, the amount that the patrons shall receive depends, and will depend, upon contingencies over which the parties to the transaction (the parties, in the case of The Public Clearing House, being the individual member expecting his endowment on the one side and the promoters and all other members on the other side) have no control and which they can not forecast.

Complainant joined issue by filing a general replication. The cause was thereupon referred, with the consent of the parties, to a master in chancery, to take the testimony therein and report

the same, with his conclusions, to the court. The master's conclusions, in brief, were (1) that the plan or scheme of the complainant is a lottery, and (2) that sections 3929 and 4041 of the Revised Statutes, as amended, in pursuance of which the aforesaid "fraud" order was issued, are not unconstitutional.

The circuit court, overruling the complainant's exceptions, confirmed the master's report, and entered a decree dismissing the bill for want of equity; whereupon the complainant appealed directly to this court, under section 5 of the Circuit Court of Appeals Act of 1891.

Under the practice of this court the findings of the master, which were confirmed by the trial court, will not be disturbed "unless *clearly* in conflict with the weight of the evidence upon which they were made." (*Kimberly* v. *Arms*, 129 U. S., 512, 525.) "* * * the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there *clearly* appears to have been error or mistake on his part." (*Tilghman* v. *Proctor*, 125 U. S., 136, 149, citing *Medsker* v. *Bonebrake*, 108 U. S., 66; *Donnell* v. *Columbian Ins. Co.*, 2 Sumner, 366, 371; *Mason* v. *Crosby*, 3 Woodb. & Min., 258, 269; *Paddock* v. *Commercial Ins. Co.*, 104 Mass., 521, 531; *Richards* v. *Todd*, 127 Mass., 167, 172.)

The following errors were assigned on appeal:

First. The court erred in not adjudging that the statutes in question were unconstitutional and void.

Second. The court erred in overruling the complainant's exceptions to the report of William M. Booth, master in chancery, to the court.

Third. The court erred in ordering and adjudging that the report of said master in chancery to the court be confirmed.

Fourth. The court erred in refusing and denying to the complainant an injunction as prayed for in the bill of complaint.

Fifth. The court erred in dismissing the complainant's bill of complaint for want of equity.

The thirty-fifth rule of this court makes the following provision concerning the assignment of errors:

1. Where an appeal or a writ of error is taken from a district court or a circuit court direct to this court, under section 5 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out *separately* and *particularly* each error asserted and intended to be urged. No writ of error or

> appeal shall be allowed until such assignment of error shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

It is evident, therefore, that complainant's assignment of errors raises but one issue for the decision of this court, namely, the constitutionality of sections 3929 and 4041 of the Revised Statutes, as amended. In respect of any other issue attempted to be raised the assignment is inadequate, in that it fails to set out the alleged error "*separately and particularly*" as required by the rule of court. However, the assignment could have raised but one other material issue, to wit, whether the complainant's plan or scheme is a lottery; that is to say, whether it is within the purview of the statutes in question; and that it is will necessarily appear in the further statement of the case now to be made.

In his report to the court, the master states the following conclusions of fact, *inter alia*, to which no material exceptions were taken, to wit:

> 1. The complainant is a corporation organized under the laws of the State of Illinois, for the purpose, as stated by its charter, of doing a general brokerage and commission business, collecting and disbursing money and conducting an exchange or information bureau for the benefit of patrons. The evidence shows that the said complainant had made a beginning of several different kinds of business and its managers had opened negotiations with different laundry proprietors, preparing to place laundries on a cooperative basis; also to handle fruits and poultry in the same manner, and also to purchase and sell goods on behalf of its patrons on commission and to exchange goods in specie in the same manner for a commission, and had actually transacted some small amount of such business, but the principal business and object for which the said complainant was organized appears to have been to act as the fiscal agent of a certain voluntary association called the League of Equity. This League of Equity consists of a large number of people, approximately five thousand at present, of various occupations, and scattered throughout the United States and Canada, each of whom in his application for membership, consents that the Public Clearing House shall act as fiscal agent for said

League of Equity. The said League of Equity was in a way successor to a prior organization called the League of Educators, and this in turn succeeded to a still prior organization called the League of Eligibles, and a certain organization or partnership called the board of managers of the League of Educators and the board of managers of the League of Eligibles were respectively fiscal agents for the two organizations.

The League of Eligibles was established in the year 1898, and was a voluntary association of unmarried people. Their certificates became matured or realized upon the contingency of marriage, provided that such marriage did not occur within one year from the time when they joined the league. The certificate had a fixed realization value of five hundred dollars, and was paid out of the monthly *pro rata* assessment levied upon all members of the league for the benefit of those members whose certificates were matured or realized.

The plan of the League of Educators was the same, except that it substituted a fixed time for the realization of the certificates, and eliminated the marriage-contingency feature.

2. The plan of the League of Equity differed from that of the League of Educators only in having a fixed monthly payment of one dollar, instead of a fluctuating or variable assessment. When the first change was made there were about

thirteen hundred members of the League of Eligibles, all of whom were given an opportunity to become members of the League of Educators without additional cost and without losing the benefit of their previous term of cooperation, and many of them availed themselves of this opportunity and became members of the League of Educators. Again, when the League of Equity was formed the League of Educators consisted of some nine thousand members, who were allowed the same privilege of joining the League of Equity, and up to the time when the fraud order was issued against the latter concern between four and five thousand of the members of the League of Educators had joined the League of Equity.

3. The evidence showed that up to about the 1st of November, 1902, during the period of the existence of the League of Eligibles and League of Educators, there had been collected from about 13,784 members a total of $137,390.66, out of which the board of managers had taken about $36,000 for their expenses and compensation for themselves and agents in the field. The remainder had been distributed among some 600 or 700 members, and at that time the board of managers had no money in their hands.

* * * * *

5. The complainant, The Public Clearing House, as such fiscal agent of the League of Equity, invites people to join the said league and holds out inducements in the shape of a large return for small amounts of money and

for services to be rendered by members of cooperators in inducing others to become members or cooperators. There is no contract or agreement issued or entered into with members by the League of Equity itself as a body or association, but a certain so-called cooperator's agreement, a copy of which is attached to the bill herein, is issued to each member or cooperator and is signed by said Public Clearing House by its president and secretary as fiscal agents for the League of Equity.

* * * * *

6. The plan or scheme of the League of Equity, as set forth in the cooperator's agreement and in other literature issued by said complainant, may be briefly stated as follows: Each person who becomes a member or cooperator pays three dollars as enrollment fee and agrees to pay the sum of one dollar per month for sixty months, or five years, and also agrees to "cooperate" by inducing other persons to become members or cooperators. The agreement states that in consideration of said enrollment fee, "and the faithful compliance with the terms of this agreement hereinafter contained, the above-named person shall receive his *pro rata* share of the total amount realized (less ten per cent) when entitled to a realization as hereinafter provided, said realization to be in accordance with the following ordinary causation and realization table." Then follows a table showing that if the league grows at the rate of fifteen to one [instead

of "fifteen to one" complainant claims that the finding should have been "fifteen to one for five years." The difference is not important] the total realization of the member at the end of five years will be at the same rate of increase—that is, he will receive nine hundred dollars for his sixty dollars paid in; if the growth is at the rate of ten to one [for 5 years] he will receive six hundred dollars at the end of five years, and so forth and so on down to a growth of only one to one, in which case he will receive only his money back, less the ten per cent which is in each case deducted as the compensation of the complainant for its services and existence as fiscal agent, and less also the three dollars enrollment fee. Aside from this ten per cent and the three dollars enrollment fee, the plan does not contemplate that complainant shall retain any of the money paid in by cooperators or that any reserve fund shall be accumulated or invested, but that the money paid in each month shall be regularly paid out each month (less ten per cent) to the so-called realizing cooperators; i. e., those whose five years' period has expired and who have continued to make the requisite monthly payments during said five years. There is an additional provision that each cooperator who shall have secured three new members in any one year may realize or receive at the end of each year one-fifth of the amount which he would be entitled to receive at the end of five years, assuming that the growth for the five years

continued at the same rate; but the plan contemplates that in the end the member who secures new members and the one who does not shall receive the same amount.

7. All members who join the League of Equity during the same month constitute a class by themselves, and are entitled to realize in all respects precisely the same amount and at the same time, excepting the member who obtains new cooperators may receive his realization in yearly installments instead of in one lump at the end of the five years' period.

The only source of income to the league, and the only funds to which its members can look for payment of the promised amount or any amount whatever, is the fund created each month by the payment of monthly dues, and the realization of any amount whatever by the *new* members is conditioned absolutely upon the constant acquisition of other new members and the new payments to be made by such new members; and what amount the members or cooperators will realize, as is stated by the league literature, depends entirely upon the ratio of growth of the league. No reserve fund is accumulated and no investments whatever are made of any portion of the money paid in by members.

* * * * *

8. It is perfectly evident that to enable any given set of cooperators to receive any large return for the amount paid by them, for instance fivefold, it will be necessary

that there should be a fivefold growth in the league, and that when the league has so grown fivefold it will be necessary, in order for the last number to receive an equally large return, that the growth be again fivefold, and so on *ad infinitum* (with the certainty that the end must come some time, and that when the end does come substantially all who have joined and paid their money during the last four years of existence of the league will lose absolutely all that they have paid in).

[The complainant excepted to the clause inclosed in parentheses.]

The master also found that:

13. The evidence showed that in this case the complainant had a full hearing before the Assistant Attorney-General for the Post-Office Department, whose duty is especially to act in such matters as this, and had an opportunity to present its reasons why the fraud order should not issue; and further showed not only that the latter official's report with the evidence was transmitted to and examined by the Postmaster-General, but that the Postmaster-General granted to the president of complainant the privilege of a personal interview on the same subject before acting in the matter and issuing the fraud order in question.

Complainant excepted to this finding, but the evidence clearly supports it. (Rec., p. 139.)

The facts thus found by the master, and to which no material exceptions were taken, clearly

constitute a lottery; and such was the conclusion of the master and the trial court. There is the small payment with the possibility or chance of a "realization" or prize, which may be large or small, according as the increase in membership is large or small; and if there is no increase in membership there is no realization—no prize.

The prize or winning of any member of the league consists of the difference between the amount he pays in as dues and the amount he draws out as his "realization." This difference is not earned by him or by money, property, or service contributed by him. He gets something for nothing. It can not be said that he earns it by securing new members, because, on the complainant's own theory, a member who secures twenty new members "realizes" no larger sum than a member who secures no recruits at all. (Rec., p. 143.) And the money he pays in does not earn anything, because no money is ever invested or otherwise turned to account. In order to win or "realize"—in order to get something for nothing—the member takes the risk or chance of the membership of the league growing or ceasing to grow. If it grows at the rate of 15 to 1 for the five years during which his membership runs he will receive fifteen times as much as he paid in; if the rate of growth is only 1 to 1 he will get back just what he put in, less the 10 per cent deducted as compensation; if it stops growing altogether—if no one joins after him—he gets nothing; he draws a blank.

Now, there is no source from which members may be paid the "realizations" as they mature, except the fixed monthly dues, and these are paid out each month, as received, to "cooperators" who "realize" during that month—that is, to "cooperators" who have paid their monthly dues for five years. Thus no funds remain on hand, and hence, when new members cease to come in—when monthly dues cease to be paid—"realizations" will cease to be paid and the end has come. Complainant's own witnesses admit that it is possible for the scheme to come to an end by the failure to obtain new members—that is, they admit that there may be a "last man." One of complainant's witnesses testified as follows:

> Q. Then it is possible to have a last man?
>
> A. No, sir; I do not say that.
>
> Q. Is it possible to have a last man if there are 5,000 cooperators in the league all quit at present, and one joins to-day, the only one that joins this month, and no members join during the next five years?
>
> A. (Continued.) Why, that is a supposition case.
>
> Q. Is that possible, assuming that that case might happen?
>
> A. You would positively know that is a fact, if one joins, and nobody else, in five years.
>
> Q. I am asking you.
>
> A. What is the question?
>
> (Question read.)

> Mr. CHILDS. Add to that question, "possible that there be a last man."
>
> A. That there would be an assumed last man. Yes; on that supposition. (Record, p. 136.)

Another witness for complainant made this statement:

> My confidence that there would be no *last man* is based entirely on what I believe to be the ability of the present membership to secure new members. (Record, p. 138.)

This clearly amounts to an admission that, if the old membership is unable to secure new members, there would be a "last man;" in other words, that the enterprise would come to an end. And when the end does come, as it must in all such schemes, the persons who joined and paid their dues during the last four years of the league's existence will lose all they paid in. The very life of the enterprise therefore depends wholly upon chance—upon the chance of an uninterrupted accession of new members. And, assuming that "chance" has decided in favor of prolonging the life of the league, the element of hazard does not end there, for "chance" still remains to determine (as already pointed out) whether the drawings or "realizations" shall be large or small, according as the increase in membership is large or small.

Mr. Bishop, in his work on Statutory Crimes (sec. 952), defines a lottery to be—

> Any scheme whereby one, in paying money or other valuable thing to another, becomes entitled to receive from him such return in value or nothing, as some formula of chance may determine.

The definition in Worcester's Dictionary, quoted by the Supreme Court in the case of *Horner* v. *United States* (147 U. S., 449, 459), is:

> A distribution of prizes and blanks by chance; a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or in other articles; * * *.

The foregoing facts plainly come within these definitions of a lottery, and hence constitute a case within sections 3929 and 4041 of the Revised Statutes, as amended, as the master in chancery and the circuit court both found. The question before the court, therefore, is whether said sections 3929 and 4041 of the Revised Statutes, as amended, violate any provision of the Constitution.

The statutes in question read as follows:

> SEC. 2. That section thirty-nine hundred and twenty-nine of the Revised Statutes be, and the same is hereby, amended to read as follows:
>
> "SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing

of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post-office at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device that remittances for the same may be made by registered letters to any other person, firm, bank, corporation, or association named therein shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such

agency in any other legal way satisfactory to himself."

SEC. 3. That section four thousand and forty-one of the Revised Statutes be, and the same is hereby, amended to read as follows:

"SEC. 4041. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money-orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money-order. But this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money-orders to any other person, firm, bank, corporation, or association named

therein shall be held to be prima-facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way." (Approved Sept. 19, 1890. 26 Stat. L., 466.)

SEC. 4. That the powers conferred upon the Postmaster-General by the statute of eighteen hundred and ninety, chapter nine hundred and eight, section two [being the above quoted section 2], are hereby extended and made applicable to all letters or other matter sent by mail. (Approved Mar. 2, 1895. 28 Stat. L., 964.)

It is claimed that these statutes are unconstitutional in that they—

I. Deprive complainant of its property without due process of law—that is, without a judical hearing.

II. Confer judical power upon the Postmaster-General, an executive officer.

III. Subject complainant's papers and property to unreasonable searches and seizures.

The designation "sections 3929 and 4041 of the Revised Statutes as amended," wherever used in this brief, includes section 4 of the act approved March 2, 1895.

THE ARGUMENT.

Inasmuch as complainant claims that the case of *The American School of Magnetic Healing* v. *McAnnulty*, decided by this court at its last term, and reported in 187 U. S., at page 94, is conclusive of the

case at bar, the Government will preface its argument with a brief statement of its view of that case. That view is that the court simply decided that the action of the Postmaster-General there complained of was unauthorized by sections 3929 and 4041, as amended, in any view of the facts that might be taken; in other words, that the facts proved did not show a case within the operation of the statutes; and in holding that such action could be reviewed by the judiciary the court did not lay down any new principle nor overrule any old one, but was in direct line with its previous decisions in *Noble* v. *R. Co.* and *New Orleans* v. *Paine*, reported in 147 U. S., at pages 165 and 261, respectively. In *Noble* v. *R. Co.* the court expressly referred to the rule (laid down in *Gaines* v. *Thompson*, 7 Wall., 347, and many other cases) that, while the judiciary could compel the performance of a ministerial duty, it could not interfere with the performance of a duty involving the exercise of judgment and discretion, and said that it was entirely consistent with the rule that the courts would prevent an executive officer from doing acts which, in any view of the facts, are ultra vires—that is, outside the statute under which he assumes to act.

The constitutionality of sections 3929 and 4041, Revised Statutes, as amended, was, it is true, challenged by counsel in the Magnetic Healing case, but the court decided the case on another point, and by express language (p. 111 of the report) left

the constitutional questions open. These questions may now be discussed, therefore, without embarrassment.

I.

Do sections 3929 and 4041 of the Revised Statutes, as amended, deny due process of law?

II.

Do said sections confer judicial power upon the Postmaster-General?

III.

Do they subject private papers and property to unreasonable searches and seizures?

The questions, whether sections 3929 and 4041 of the Revised Statutes, as amended, confer judicial power upon the Postmaster-General, and whether they subject papers and property to unreasonable searches and seizures, are included in the larger question, whether said sections deny due process of law; for if it shall be shown that they do not deny, but provide, due process, it will necessarily follow that they do not confer judicial power upon the Postmaster-General or subject private papers and property to unreasonable searches and seizures. Complainant's contentions will, therefore, be considered together.

Do sections 3929 and 4041 of the Revised Statutes, as amended, deny due process? It is not intended to tax the patience of the court with an extended or academic discussion of a subject so

fundamental as due process of law or the law of the land. All that is intended—all that is proper or necessary—is to inquire whether the particular acts of Congress which have been drawn in question satisfy the constitutional guaranty of due process.

First. The term "due process of law" is not confined to judicial process; it includes administrative process as well. And property may be seized and detained, at least temporarily and conditionally, by an administrative officer, acting under administrative process, without in any way violating the law of the land. Said Cooley, J., in *Weimer* v. *Bunbury* (30 Mich., 201):

> There is nothing in these words ("due process of law"), however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the Government is carried on and the order of society maintained is purely executive or administrative. *Temporary deprivation of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties*, where it has never been supposed that the common law would afford redress.

This rule is dictated by necessity as well as reason. If, without exception, whenever any private right is challenged by the State, the question must be submitted, in the first instance, to the comparatively slow processes of judicial determination, it is not putting it too strong to say that the result

must be fatal to the efficiency of government and the good order of society. Take the postal system itself as an illustration. In the very statutes which complainant has attacked, Congress has enacted, in the interest of public morality, that mail matter addressed to persons engaged in lotteries and fraudulent enterprises shall be denied the privileges of the mails. Now, there is a multiplicity of cases where persons seek to use the mails in violation of the letter and spirit of these enactments, and if it were required in every case that before he could be deprived of the privileges of the post, it must be *finally and judicially* determined that the person complained against was engaged in one of the inhibited enterprises, then not only would the judiciary be burdened with an immense volume of new work, but, during the litigation, which would often be long drawn out (judicial procedure being far less summary than executive), the mails would be flooded with the obnoxious matter, thus defeating in a large measure the beneficent purpose of Congress.

It is, therefore, no argument against the constitutionality of sections 3929 and 4041, Revised Statutes, as amended, that they do not provide for a judicial hearing in the first instance—that the first step in their enforcement is taken by an administrative officer under administrative process—and their validity must be affirmed unless the court is convinced on other grounds, that their enactment was an "*arbitrary* exercise of the

powers of government unrestrained by the established principles of private right and distributive justice." (*Bank of Columbia* v. *Okely*, 4 Wheat., 235.) The next step, therefore, will be to show that the statutes in question are not *arbitrary*—that they do not attempt to dispose of rights by arbitrary methods.

Second. These statutes, as construed by this court (*American School of Magnetic Healing* v. *McAnnulty*, *supra*) do not deprive complainant of its "*right*" to use the mails without a judicial hearing.

Congress may prescribe what shall be admitted to and what shall be excluded from the mails, and the power has no limitation, except that the basis of admission and exclusion must be reasonable and free from unjust discrimination. (*Ex parte Jackson*, 96 U. S., 727; *In re Rapier*, 143 U. S., 110.) That being the case, no one can claim a "right" to use the mails for the transmission of matter which Congress has properly declared to be nonmailable, and hence no question of the deprivation of a right can possibly arise until it is charged that matter which under the regulations of Congress is mailable has been excluded, and, under the decision in the Magnetic Healing case, whenever that charge is made—i. e., whenever the question of right is raised—it will be heard by the courts in an appropriate proceeding, and relief given if deserved.

The action of the Postmaster-General under the statutes in question no more involves the exercise of judicial power than do "all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law." (Per Mr. Justice Curtis in *Murray's Lessee* v. *Hoboken Land and Imp. Co.*, 18 How., 272, 280.) He does not undertake to adjudicate upon any right; he simply administers a postal regulation made by Congress. If, in the performance of that duty, as he sees it, he invades any vested right, the courts may be appealed to for redress. And so in the case at bar, if complainant considers its right to use the mails to have been violated by the Postmaster-General, in other words, if it contends that that officer's finding that it is engaged in a fraudulent or lottery enterprise is without foundation and unreasonable, it may, under the decision in the Magnetic Healing case, *supra*, be heard (and it has been heard) on that question in a court of justice. And that is all the Constitution requires; that is due process of law. The fact that the judicial hearing is postponed a stage does not make the proceeding any the less due process, so long as the postponement is not unreasonable or oppressive; and it can not be said in this case that the postponement is unreasonable or oppressive, because the party considering himself aggrieved by the action of the Postmaster-General may appeal to the courts at

once. The language of the supreme court of Indiana in the case of *Flournoy* v. *The City of Jacksonville* (17 Ind., 169, 173, 174), where a somewhat similar state of facts was presented and the same contention made as here, covers the case in hand at every point, to wit:

> The case is very like that of *Maynes* v. *Moore* (16 Ind., 116), where the auditor of State, a ministerial officer, was authorized to issue the writ commanding satisfaction, but which, if the party did not see fit to obey, he could enjoin, and thus transfer his cause to a court by injunction.
>
> * * * * *
>
> The provision is not unconstitutional because it deprives a party of a right without a judicial hearing and trial by jury. As in the Maynes case by injunction, expressly authorized by statute as a part of the remedy, so here by appeal from the issue of the precept, the writ, the party can transfer his case to a judicial tribunal, and demand the right of trial by jury. The remedy is not an onerous, a burdensome one, even.
>
> The provision is not unconstitutional because it authorizes a ministerial act by which possession of property is taken *before* the right to it has been judicially determined. This is done in cases of attachment and replevin, without objection, and is a matter in the discretion of the legislative power in creating remedies. It must not deprive a party of his property without a judicial hearing; *but the stage of proceedings*

> *at which that hearing shall take place*—the manner, in short, in which the cause of a party shall be got before the judicial tribunal, so it is not an unreasonably inconvenient and embarrassed one—*is with the legislative power*. (*The New Albany, &c., R. Co.* v. *Connelly*, 7 Ind., 32.)

The contention of the Government under this head is also sustained by the decision of this court in the case of *Chicago, &c., Ry. Co.* v. *Minn.* (134 U. S., 418), a case we expect to see cited on behalf of complainant. The question there was as to the constitutionality of a statute of the State of Minnesota which established a railroad commission and undertook to clothe it with the power to make rates which would be *final and conclusive*. Mr. Justice Blatchford, in delivering the opinion, said:

> The construction put upon the statute by the supreme court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be reexamined here as to its propriety or accuracy. The supreme court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but *final and conclusive* as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as

to their equality or reasonableness in fact, that, under the statute, the rates published by the commission are the only ones that are lawful, and therefore in contemplation of law the only ones that are equal and reasonable; and that in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

This being the construction of the statute by which we are bound in considering the present cases, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an *absolute finality*, the action of a railroad commission which, in view of the powers conceded to it by the State court, can not be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

> In view of the opinion delivered by that court (the State supreme court), it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus, if the court should adhere to its opinion that, under the statute, *it can not investigate judicially the reasonableness of the rates fixed by the commission.*

The plain inference from this language (and this inference is confirmed by the decision in *Reagan* v. *Farmers L. & T. Co.*, 154 U. S., 362) is that this court would have held the Minnesota law to be constitutional if the supreme court of that State had held that the judgment of the railroad commission as to what rates are just and reasonable was not final, but open to review, if disputed, in a judicial proceeding. The court in effect decided, either expressly or by necessary implication, that the railroad commission, acting under statutory authority, might, in the first instance, say what rates are reasonable, but that if their reasonableness were challenged, it would raise a judicial question which must be submitted to a court for decision; that until such challenge is made no right is drawn in question—no issue is raised for the judicial power to act upon. And the power which the court thus conceded might be conferred upon the railroad commission is of precisely the same character and scope as that conferred upon the Postmaster-General by sections 3929 and 4041 of the Revised Statutes, as amended. Under those statutes the Postmaster-General may, in the first

instance, determine what matter shall be denied the privileges of the mails, but when the correctness and reasonableness of his determination are disputed—that is, when it is contended that he has attempted to exclude matter which the law does not declare to be nonmailable—a judicial question is raised, the decision of which must be left to the courts (*American School of Magnetic Healing* v. *McAnnulty*, *supra*); but until his determination in a particular case is so disputed no right is brought in issue and there is nothing for the judicial power to act upon. If, therefore, statutes authorizing railroad commissions to establish rates—the reasonableness of which is subject to judicial review—do not deny due process, it is difficult to see wherein sections 3929 and 4041 of the Revised Statutes, as amended, are open to that objection.

But if the argument up to this stage were wholly without force, the Government could still rest its case with confidence upon the analogy between, or rather the identity of, the power vested in the Comptroller of the Currency by the national banking law, a power which has been repeatedly sustained and upheld by this court (*Kennedy* v. *Gibson*, 8 Wall., 498; *Casey* v. *Galli*, 94 U. S., 673; *United States* v. *Knox*, 102 U. S., 422; *Bushnell* v. *Leland*, 164 U. S., 684), and the power vested in the Postmaster-General by sections 3929 and 4041 of the Revised Statutes, as amended. The national banking law (Revised Statutes, sec. 5234;

1 Sup. to Revised Statutes, p. 107) authorizes the Comptroller of the Currency to appoint receivers for and to close insolvent national banks, while sections 3929 and 4041 of the Revised Statutes, as amended, authorize the Postmaster-General to refuse to forward mail matter addressed to persons engaged in lotteries or fraudulent enterprises; and it is left to the Comptroller to determine when a national bank is insolvent, just as it is left to the Postmaster-General to determine when a person is engaged in a lottery or fraudulent scheme. Doubtless if it were claimed that either officer had acted outside his authority—that is, had closed a bank which was not insolvent or denied the privileges of the mails to a person not engaged in promoting a lottery or fraud—the courts could be appealed to for redress, since such a claim would raise an issue which none but the judicial power would be competent to pass upon. (*United States* v. *Knox*, 102 U. S., 425; *American School of Magnetic Healing* v. *McAnnulty*, *supra*.) Now, if there is any difference between the power thus vested in the Comptroller of the Currency and that vested in the Postmaster-General, it is that the former—the power to close a business and appoint a receiver to take charge of it—is much more judicial in its nature and far-reaching in its effects; and if the one is a constitutional power—is due process of law—certainly the other must be. In the last case where this power of the Comptroller was questioned, the case of *Bushnell* v.

Leland (*supra*), this court, Mr. Justice White delivering the opinion, said (pp. 685, 686):

> All these alleged errors may be reduced to the single contention that under the national banking law the Comptroller of the Currency is without power to appoint a receiver to a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders of such bank, *without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank, and that the lodgment of authority in the Comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power in violation of the Constitution.*
>
> All of these contentions have been long since settled, and are not open to further discussion. (*Kennedy* v. *Gibson*, 8 Wall., 498; *Casey* v. *Galli*, 94 U. S., 673; *United States* v. *Knox*, 102 U. S., 422.) When, after the adjudication in *Kennedy* v. *Gibson*, the questions were for a second time pressed in argument, the court contented itself with calling attention to the fact that they had been affirmatively adjudicated upon and were concluded. We see no reason now to reopen controversies which were then treated as concluded and have since been approved and in all respects fully affirmed. * * * A causual inspection of the points pressed by counsel in *Casey* v.

Galli makes evident the fact that the very arguments now advanced were then urged upon the court and held to be untenable.

Third. There is yet another course of reasoning by which to show that sections 3929 and 4041 of the Revised Statutes, as amended, do not deny due process. Those sections were enacted in the exercise of the police power of Congress—or an equivalent power—over the postal system. They are police regulations made in the interest of the public good and morality. That Congress is vested with the police power, or its equivalent, in respect of the postal service is no longer disputed. In the case of *In re Rapier* (143 U. S., 110), the constitutionality of an act of Congress making it a misdemeanor to deposit in the mails lottery tickets, etc., was attacked. The Government contended that the act was valid as an exercise of police power, and its contention was sustained. Mr. Chief Justice Fuller, speaking for the court on that occasion, said:

> The States before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the *police power* in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress it was as a *complete* power, and the grant carried with

> it the right to exercise *all the powers* which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

Certainly, then, if the States surrendered to Congress their whole power over the postal system, the grant must have included the police power or its equivalent, and therefore sections 3929 and 4041 of the Revised Statutes as amended, having been enacted to prevent immorality and fraud, are of the nature of police regulations, which the Postmaster-General is authorized to enforce. Now, it has always been conceded, we believe, that an administrative officer charged with the execution of the law may enforce a police regulation against a person or subject-matter without it being *judicially* ascertained beforehand that the person or subject-matter is within the scope of the regulation (leaving it to courts to determine afterwards, in case the issue is raised, whether any vested right was invaded in the enforcement of the regulation). To hold otherwise would absolutely destroy the efficiency of those police regulations upon which the safety—indeed, the very existence of society depends. What, for example, would be the value of quarantine laws, inspection laws,

health regulations, and the whole system of municipal police, if, before the law could be enforced in a particular case, it had always to be determined by a court whether the case came within the operation of the law? Judicial procedure is, of necessity, slow, deliberate, while regulations of the kind described, to be of any force, must be capable of immediate execution as occasion arises, without the preliminary of a judicial or any other hearing.

This principle is fundamental, and its validity may be said to be universally assumed and acted upon by legislatures and courts, and therefore only a few leading instances of its application will be referred to.

Dent v. *West Virginia* (129 U. S., 114). This case raised the question of the constitutionality of a statute of West Virginia which requires every practitioner of medicine in the State to obtain a certificate from the State board of health that he is a graduate of a reputable medical college in the school of medicine to which he belongs; or that he has practiced medicine in the State continuously for ten years prior to March 8, 1881; or that he has been found upon examination to be qualified to practice medicine in all its departments, and which subjects a person practicing without such certificate to prosecution and punishment for a misdemeanor. The plaintiff, who did not comply with the conditions necessary to obtain a certificate, contended that his right to continue in the

practice of his profession was a property right of which he could not be deprived, consistently with due process, by a board of administrative officers; that he could only be deprived of the right after a judicial hearing (p. 120 of the report). But this court, although conceding that the right was a property right, overruled plaintiff's contention that the right could not be passed upon (even in the first instance) by an administrative officer, and sustained the statute as a police regulation. Mr. Justice Field, who delivered the opinion of the court, used this language applicable to the case at bar:

> Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforcible in the usual modes established in the administration of government with respect to kindred matters; *that is, by process or proceedings adapted to the nature of the case.*

Health Department v. *Rector* (145 N. Y., 32, 40). This case involved the constitutionality of a statute of New York which requires that the owners of all houses of a certain description, when directed by the board of health, shall provide such houses with Croton or other water in sufficient

quantity at one or more places on each floor occupied or intended to be occupied by one or more families. Pursuant to the statute an action was brought against the defendant in error by the health department for noncompliance with its order to provide water on each floor of a certain tenement house. One of the defenses was that the statute denied due process of law because it did not provide for any notice or hearing before the issuance of the orders of the health department. In overruling that defense the court of appeals, Peckham, J., delivering the opinion, said:

> As to the latter objection, it may be said that in enacting what shall be done by the citizen for the purpose of promoting the public health and safety it is not usually necessary to the validity of legislation upon that subject that he shall be heard before he is bound to comply with the direction of the legislature. (*People ex rel.* v. *Board of Health*, 140 N. Y., 1, 6.) The legislature has power and has exercised it in countless instances to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. * * * I have never understood that it was necessary that any notice should be given under such circumstance before a provision of this nature could be carried out.

In *Shafer* v. *Mumma* (17 Md., 331), the court of appeals of Maryland stated very clearly the grounds

upon which the summary enforcement of police regulations is justified:

> But it is said, on behalf of the plaintiff, that since the adoption of the present State constitution, the mayor of Hagerstown could not try and fine under the ordinance, because the exercise of such power is but the exertion of the judicial power, which, by the constitution, is confided to certain specified classes of persons, and that the mayor of Hagerstown is not included in that enumeration.
>
> This argument would be entitled to great weight if we thought the power exercised by the defendant was, in the sense of the Constitution, a part of the judical power. But we entertain no such opinion. We regard it as but a part of the police power, as contradistinguished from the regular judiciary powers of the State. From time immemorial, a distinction has been observed between the two, both in England and this country. It would be next to, if not quite, impossible for a large city like Baltimore to preserve order within its limits, preserve the streets from interruption—indeed to do most of the thousand things necessary to be done to carry on its various and indispensable operations—*if in every case it were a necessary preliminary that the offender should be regularly prosecuted by presentment, indictment, and trial.* It has always been understood that, under the police power, persons disturbing the public peace, persons guilty

> of a nuisance, or obstructing the public highways, and the like offenses, may be summarily arrested and fined, without any infraction of that part of the Constitution which apportions the administration of judicial power strictly as such.

Although this case was decided with particular reference to the police system of municipalities, the reasoning employed applies to police regulations in general.

Fourth. If the argument up to this point has been successful, it has shown that the statutes whose constitutionality is in issue do not deny due process of law; and if it has shown that, then, a priori, it must have shown that the statutes do not clothe the Postmaster-General with judicial powers. However, since the latter point is an important one, it will now be considered separately, at the risk of some repetition.

It is often very convenient in the administration of the affairs of government—and sometimes it is indispensable—that executive officers have authority to deal with subjects in the first instance in a manner calling for the exercise of power somewhat in the nature of judicial power, and this is not open to the objection that it vests such officers with authority to decide judicial questions, because no judicial question is presented—no right of life, liberty, or property is drawn in question—until the contention is made that an executive officer in the exercise of power alleged to have

been granted to him has acted fraudulently or beyond his authority, and that question is always open to judicial determination.

The authority exercised by the Postmaster-General under sections 3929 and 4041 of the Revised Statutes, as amended, is of the sort just described, as is also that conferred on the Comptroller of the Currency by the national banking law. A still more striking instance is the power conferred upon local boards of health to take possession of, purify, and even destroy buildings or other property of the citizen, when the public health or comfort demands such strong measures. (Cooley Const. Lim. (6 ed.), p. 720, note 3.) And in the judicial, no less than in the executive, branch of government property is often summarily seized, in the first instance, by ministerial officers, subject to a subsequent judicial hearing of the right to hold it, if the right is contested. Such, for example, is the case in attachment and replevin proceedings.

In the case of *Murray's Lessee et al.* v. *Hoboken Land, etc., Co.* (18 How., 272, 280, 284), the distinction between judicial and executive powers and duties was carefully considered and learnedly discussed by Mr. Justice Curtis, speaking for this court. The question there was whether an act of Congress which authorized the auditing of accounts of collectors of customs, and the ascertainment of balances due, and the issuing of a warrant by the Solicitor of the Treasury authorizing

the sale of the property of the debtor, conferred judicial power on executive officers. In answering the question in the negative, the court, through Mr. Justice Curtis, differentiated between judicial duties strictly speaking and those duties which, though involving the investigation of facts and the application of rules of law, are nevertheless administrative or executive.

> That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties, the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795 (12 Wheat., 19), or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power that they involve the exercise of judgment upon law and fact.

The power exercised by the Postmaster-General under sections 3929 and 4041 of the Revised Statutes, as amended, is clearly within this description. Under those sections, that officer does inquire into the existence of facts and apply to them rules of law, but he does not adjudicate upon any right, as already shown.

Further on in his opinion Mr. Justice Curtis stated this important rule as governing the delegation of judicial power:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters involving *public* rights which *may* be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial determination, but which Congress *may* or *may not* bring within the cognizance of the courts of the United States, as it may deem proper.

The test question in the case now before the court must, therefore, be this: Has Congress attempted by sections 3929 and 4041 of the Revised Statutes, as amended, to "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty?" Certainly it has not, for, conceding that the right to use the mails in accordance with the laws is a property right, no dispute or contest concerning it—no "matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty"—arises until it is claimed that the Postmaster-General has violated the right; that is, has excluded matter which, under the law, is mailable, and Congress has not withdrawn the

hearing of that question from judicial cognizance; but, on the other hand, it has been expressly held by this court to be within judicial cognizance. (*American School of Magnetic Healing* v. *McAnnulty*, *supra*.)

Short reference will now be made to some of the remaining cases in which powers closely resembling, in general features, those vested in the Postmaster-General by the statutes in question have been held to be not judicial.

In *Bushnell* v. *Leland* (*supra*) it was held, reaffirming *Kennedy* v. *Gibson*, *Casey* v. *Galli*, and *United States* v. *Knox* (*supra*), that the power conferred by Congress upon the Comptroller of the Currency to appoint receivers for defaulting or insolvent national banks and to call for ratable assessments upon the stockholders thereof is not judicial power in the constitutional sense. The cases sustaining this power of the Comptroller have already been referred to and their application to the case at bar pointed out, *supra*, pages 33–36.

In *Hoff* v. *Jasper County* (110 U. S., 53, 56) it was contended that a statute requiring a State auditor to register municipal bonds and *to certify that all the conditions of law have been complied with in their issue* was void because it conferred judicial power upon an executive officer; but this court held the contrary, saying:

> As to the objection that the duties of the auditor, in respect to his inquiries under the fourth section, are judicial rather than exec-

> utive, it is sufficient to say that *every executive officer, when called on to act in his official capacity, must inquire and determine whether, on the facts, the law requires him to do one thing or another.*

In *Hempstead, Land Agent*, v. *Audenhill's Heirs* (20 Ark., 337, 357) the supreme court of Arkansas, reversing the trial court, held that an act of the legislature conferring upon swamp-land agents the power to determine the validity of conflicting claims to swamp lands, and to pass upon the validity of title, upon application for patent certificates upon the surrender of the original certificates of purchase, was not unconstitutional, the power conferred being a ministerial and not a judicial power. The court said:

> The court below seems to have been under the impression that this provision of the act was an attempt to confer judicial power upon the land agents, and was, therefore, void. If the premises were correct the conclusion would follow as a consequence, for the land agents, being executive officers, could not be clothed with judicial power under the Constitution. But such, perhaps, was not the intention of the legislature, and such can not be the effect of the provision of the act in question. On the contrary, it merely confers upon the land agent ministerial power *to inquire into the facts in relation to conflicting entries, and to give the patent certificate to the party appearing to be entitled to it by law. But his decision is not conclusive upon the rights of the parties.*

Neither is the decision of the Postmaster-General to refuse to permit the delivery of mail addressed to a person because he is engaged in a lottery conclusive.

In *State of Louisiana ex rel. Martin* v. *Police Jury of Caddo Parish* (32 La. Ann., 1022, 1026) the supreme court of Louisiana held that an act of the State legislature establishing a board *to sift and adjust the outstanding indebtedness of the parish of Caddo* did not confer judicial power upon that board. Said the court:

> The objection to the constitutionality of the law constituting the board of audit is bottomless. It is not true that the legislature intended to create a body clothed with judicial powers, so as to make it a component part of the judicial department as organized by the constitution. It had the power to create such a body, as it did, for the purpose of sifting and adjusting the outstanding indebtedness of the parish of Caddo, whose finding, however, on any portion of that indebtedness was *not to be final* and irrevocable. * * *

In *Ex parte Wells* (21 Fla., 280) it was held that an act of the Florida legislature providing for the dissolution of defaulting cities does not confer judicial power on the governor of the State by making it his duty *to ascertain and declare* by proclamation *to what cities the act applies*. The analogy between this case and the case at bar is very close; in each it is contended that the power given to an

executive officer to ascertain in the first instance to what subjects a legislative act applies is a judicial power.

In *Gough* v. *Dorsey* (27 Wis., 119) the supreme court of Wisconsin sustained an act of the State legislature under which the school land commissioners exercised the power (subject to review by the courts) of holding a sale of school lands, "made by mistake, or not in accordance with law, or obtained by fraud," to be void and requiring the purchaser to surrender his certificate. The court said:

> The exercise of a summary jurisdiction of the kind by the commissioners may be often very useful, and, subject to review and correction in the courts, the objection to it does not seem insuperable. The process of judicial investigation, while it has the advantage of greater care and deliberation, and consequently of greater certainty in attaining correct results, has also the disadvantage of many times being very slow. In the very numerous transactions of the school land office, cases may not be infrequent where delay would be most injurious. The cases may be plain ones and prompt determination required. They may be such that no judicial examination will be advised or sought, but the decision of the commissioners accepted as correct. In such cases the benefits of the summary mode of proceeding are manifest, and the evils disappear when it is known that the judicial remedy is open to any

> person feeling himself aggrieved by the action of the commissioners. And the giving of such power is in harmony with what has been the practice of our Government, both State and National, in this respect. The officers intrusted with the sale and disposition of the public lands have always been invested with certain limited judicial powers of the kind, closely connected with the duties they are required to perform, and which seem necessary to a proper performance of them. They have been authorized to vacate entries of land under similar circumstances, and to issue certificates to other applicants. They have been empowered to hear and decide questions of contested rights of preemption or entry, which are quite judicial in their nature and often present points of much difficulty and importance. In some instances an appeal has been given directly from their decision to the courts * * *. And in all cases it has been held, we believe, where no appeal is directly given, that the proceedings of such officers, so far as they act judicially, are subject to review and correction in any proper action instituted between the parties in interest.

The case of *United States* v. *Rider* (50 Fed. Rep., 406) is one we expect to see cited on behalf of complainant. One question there was whether Congress could confer upon the Secretary of War (as it had attempted to do) the power, after notice and hearing, to order persons owning or control-

ling bridges to make such alterations in them as he, the Secretary, might direct, whenever he had good reason to believe that they were unreasonably obstructing navigation. Refusal or failure to comply with the Secretary's orders was made a misdemeanor. The district court held that the power of the Secretary in a particular case depended upon his having adjudged that the bridge was an obstruction to navigation; that such adjudication, being *final and conclusive* under the statute, was an exercise of judicial power, and that for that reason, among others, the statute was unconstitutional. The language of the court clearly indicates, however, that it would not have held the statute to be unconstitutional on this ground if the determination of the Secretary of War, under the law, had not been *final and conclusive*. Thus the court said in one place:

> The power of the Secretary depends upon his having adjudged that the bridge is an obstruction, *and his adjudication is made final and conclusive.*

And again, after noting that an early law of Congress authorized the Secretary of State, upon the surrender of a patent, invalid or inopertive by reason of inadvertence, accident, or mistake, to cause to be issued a new patent for the same invention and for the residue of the term of the original patent, the reissued patent to be liable to the same defenses as the original, the court proceeded to distinguish that statute from the one before it.

> But there is this radical difference between the case of a reissued patent and the case now before the court: The patent, original or reissue, is only *prima facie evidence* of an exclusive right in the patentee, and it is open to all defenses, including, in the case of a reissued patent, those involving an investigation into the question whether there was, in fact, any such inadvertence, accident, or mistake as was requisite to authorize the reissue, while here the Secretary of War finds and decides *conclusively and finally* whether the bridge is an obstruction, what changes shall be made, and within what time; and the only questions left open to be tried in the criminal prosecution for misdemeanor which he is authorized to set on foot are whether he has made the findings and decision, ordered the changes, given the proper notices, and whether the defendants have complied with his orders.

It is thus plain that the decision of the court on this point would have been otherwise if the findings of the Secretary of War had not been made *final and conclusive*, and since the rulings of the Postmaster-General under sections 3929 and 4041 of the Revised Statutes, as amended, *are not final and conclusive*, but may be reviewed by the courts for the purpose of determining whether he acted fraudulently or beyond his authority, Rider's case is an authority in favor of their constitutionality.

Fifth. It is said, however, that even if Congress may authorize the Postmaster-General to

detain any mail matter *concerning lotteries or fraudulent schemes* addressed to persons engaged in those unlawful enterprises it does not follow that Congress may authorize the Postmaster-General to detain *all* mail matter addressed to such persons.

The answer to that contention is plain. It has already been pointed out that the statutes alleged to be unconstitutional are police regulations, or at least they are of the nature of police regulations, and when the validity of such regulations is attacked there are but two things to be considered: First, whether the subject is a proper one for police regulation; and, second, whether "the means are reasonably necessary for the accomplishment of the purpose." (*Lawton* v. *Steele*, 152 U. S., 132, 135.) That the closing of the mails to lotteries, in order to prevent their demoralizing influence from spreading, is within the police power or an equivalent power—if anyone objects to calling it police power when exercised by the Federal Government—is settled law. (*In re Rapier*, 143 U. S., 134.) The only question, therefore, is, Are the statutes in question *reasonably adapted* to accomplish the public end in view? Was it *reasonable* for Congress to enact, in its effort to bar from the mails matter concerning lotteries and fraudulent schemes in general, that *all* mail addressed to a person promoting a lottery or fraudulent scheme should be refused delivery? The reason why Congress extended the prohibition

to all mail matter and did not confine it to the objectionable matter is clear. How could it be determined what sealed matter is objectionable and what is not? Not by anything on the outside of the letter or package, because the persons affected are shrewd enough to have matter relating to their obnoxious enterprises addressed just as their strictly private mail is addressed. The only way to determine the question would be to provide for the *opening and inspection of all mail* addressed to persons within the operation of the statutes, and if the provision of sections 3929 and 4041 of the Revised Statutes, as amended, is open to objection, how much greater would be the objection to a provision of this sort. It is thus apparent that if Congress had only authorized the Postmaster-General to detain the objectionable matter its purpose would have been defeated, because the difficulties in the way of separating the objectionable from the unobjectionable would have proved insurmountable. And unless the Postmaster-General could constitutionally be given the power to withhold from delivery *all* mail matter—not merely that which is obnoxious—addressed to persons engaged in lotteries and fraudulent schemes, his power in the premises, so far as its practical value is concerned, might as well be denied altogether. And it would come to this, that a great public facility, operated by a department of the executive service of the Gov-

ernment, could be used, without fear of interference from the head of that department, to further frauds and lotteries—the one *mala in se*, the other denounced by the law of nearly every civilized country. Is this court ready to acknowledge such a degree of impotence in the Federal Government?

And considering the end to be accomplished, the insidious and far-reaching effects of the evil to be suppressed, and the difficulties which in the nature of things beset the regulation of the subject, is the court prepared to overrule the judgment of Congress that the means which it provided are "reasonably necessary" to accomplish the public end desired, and to affirm that they have no "real or substantial relation" to that end? *Lawton* v. *Steele*, *supra; Mugler* v. *Kansas*, 123 U. S., 623, 631; *Powell* v. *Pennsylvania*, 127 U. S., 678, 684.) Said Mr. Justice Brown, in delivering the opinion of the court in *Lawton* v. *Steele* (*supra*), referring to the police power:

> While the legislature has no power to arbitrarily declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, *and if the object to be accomplished is conducive to the public interests it may exercise a large liberty of choice in the means employed.*

And the following words of Chief Justice Waite in the *Sinking Fund Cases* (99 U. S., 700, 718), always appropriate when the constitutionality of a

law is questioned, may well be borne in mind in determining these issues:

> Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the Government can not encroach on the domain of another without danger.

There is yet another principle which may be invoked to refute the contention that sections 3929 and 4041, Revised Statutes, as amended, are unconstitutional because they extend to innocent as well as objectionable mail matter. It is this: laws in the nature of police regulations, such as the acts in question, are valid and can not be challenged by the courts, notwithstanding their enforcement may cause inconvenience, or even oppression, to some who have done nothing contrary to the policy of the laws.

Thus, in *Boston Beer Co.* v. *Massachusetts* (97 U. S., 25), this court said:

> If the public safety or the public morals require the discontinuance of any manufacture or traffic the hand of the legislature can not be stayed from providing for its discontinuance by any incidental *inconvenience* which individuals or corporations may suffer.

To the same effect is the case of *Barbier* v. *Connolly* (113 U. S., 27):

> The *inconvenience* arising in the administration of police laws are matters entirely for the consideration of the State; they are to be remedied only by the State.

The decision of this court in the case of *Powell* v. *Pennsylvania* (127 U. S., 678, 685) is a complete answer to the contention we are discussing. That case raised the question of the validity of a statute of the State of Pennsylvania which prohibits the manufacture or sale of any form of oleomargarine, whether it contained any unwholesome ingredient or not, just as the statutes in the case in hand authorize the Postmaster-General to cause the detention of *all* mail matter, whether of an innocent or objectionable character, addressed to persons engaged in the obnoxious enterprises named. It was argued for the plaintiff that while the State might prohibit the manufacture of oleomargarine which contained harmful ingredients, it could not prohibit its manufacture altogether, for that would extend the prohibition to an article which was free from injurious properties—the same argument, mutatis mutandis, that is made in the case at bar. To this the State answered that the manufacture of oleomargarine was conducted with such skill and secrecy that it baffled ordinary inspection to distinguish that which is injurious from that which is not, and that therefore in order to reach the former, its prohibition must include the latter. The

issue thus raised, which was decided in favor of the State, is identical with that in the case at bar. In the one case the statute forbade the manufacture of *all* oleomargarine because it is impossible to separate the good from the bad; in the other the statute forbade the delivery of *all* mail matter because it is impossible to separate the innocent from the objectionable. Mr. Justice Harlan, who delivered the opinion of the court, said:

> Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, *the entire suppression of the business rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients* are questions of fact and of public policy which belong to the legislative department to determine. * * * If all that can be said of this legislation is that it is unwise, or *unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine* as an article of food, their appeal must be to the legislature, or to the ballot box, not to the judiciary. The latter can not interfere without usurping powers committed to another department of goverment.

Sixth. If it has been established to the satisfaction of the court that the statutes in question

provide for due process of law, then, of course, it must also have been established that they do not subject complainant's papers and property to unlawful or unreasonable searches and seizures.

Giving the terms their very widest meaning, it can not be said that the statutes authorize *any* "seizure" of property or "search" of papers whatever, much less *unlawful* seizure or search. The most that the Postmaster-General can do under those statutes, and all that he has attempted to do, is to refuse to permit the use of the postal service for the transmission of matter addressed to persons engaged in promoting frauds and lotteries. If, in spite of the "fraud" order of the Postmaster-General, objectionable matter is deposited in the mails, it is returned to the sender when his address is known; when his address is not known it is forwarded to the dead-letter office to be disposed of as other dead matter. No property is "seized," none is "searched." If the sender is known the Government returns the matter to him at its own expense; if he is unknown he may obtain the matter by applying for and indentifying it, and so far from holding it, the Post-Office Department is always glad to get rid of it.

Without going further into the consideration of a contention that has already been answered in discussing due process, and which was flimsy to start with, it is sufficient, to show how groundless it is—so far as the claim of unreasonable search is concerned—to call attention to the provision of

the statutes, that nothing therein contained "shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself." And in respect to the alleged seizure, it is enough to say that, if to refuse to deliver mail matter addressed to persons engaged in lotteries and frauds is unlawfully *to seize* such matter, then Congress is "compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls" (per Chief Justice Fuller, *In re Rapier*, 143 U. S., 134), a somewhat strange application of a principle designed for the well-being of society.

Having now shown, as we believe, that the statutes drawn in question do not violate the Constitution of the United States in any of the respects complained of, it is respectfully submitted that the decree of the circuit court should be affirmed.

W. A. Day,
Assistant to the Attorney-General.

O